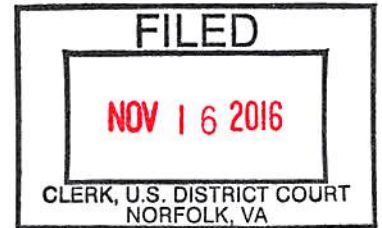


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division



UNITED STATES OF AMERICA,

Respondent,

v.

CRIMINAL ACTION NO. 4:07cr144

ROBERT WILLIAMS,

Petitioner.

MEMORANDUM OPINION AND ORDER

Robert Williams ("Petitioner") has submitted a Motion pursuant to Title 28, United States Code, Section 2255 to Vacate Sentence by a Person in Federal Custody ("§ 2255 Motion").

Having thoroughly reviewed the Parties' filings in this case, the Court finds this matter is ripe for judicial determination. For the reasons set forth below, Petitioner's § 2255 Motion is **DENIED**, and Respondent's Motion to Dismiss is **GRANTED**.

I. FACTUAL AND PROCEDURAL HISTORY

On October 29, 2007, Criminal Information was filed against Defendant. ECF No. 1. On December 19, 2007, a writ of habeus corpus ad prosequendum was issued for Robert Williams. ECF No. 6. On January 2, 2008, Petitioner, in open court, waived his right to prosecution by indictment and consented that the proceeding may be by information rather than indictment. ECF No. 9. On that same day, Petitioner also entered a plea agreement and pled guilty to Count One and Count Two. ECF No. 10. Count One charged Petitioner with conspiracy to possess with intent to distribute more than fifty grams of cocaine base, in violation of 21 United States Code ("U.S.C.") §§ 846 and 841(a)(1). *Id.* Count Two charged Petitioner with possession of a firearm during a drug trafficking offense, in violation of 18 U.S.C. § 924(c). *Id.* On April 3,

2008, the Court found Petitioner guilty of Counts One and Two, and sentenced him to two hundred and forty months for Count One, and sixty months for Count Two all to be served consecutively. ECF No. 18. Additionally, the sentences imposed for Counts One and Two run concurrently with Petitioner's sentence imposed in Williamsburg Circuit Court. *Id.*

On May 16, 2016, Petitioner filed a pro se Motion to Vacate Sentence under 28 U.S.C. § 2255 ("§ 2255"), and requested that his case be reviewed pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). ECF No. 48. On July 14, 2016, the Court Ordered under seal that the Federal Public Defender represent Petitioner in this matter. ECF No. 50.

On September 6, 2016, Respondent filed a sealed Motion to Dismiss Petitioner's challenge to his sentence under 18 U.S.C. § 924(c). ECF No. 53. On September 23, 2016, Petitioner filed a response, through counsel, stating, "after evaluation of the Petitioner's *pro se* motion pursuant to § 2255 seeking relief under *Johnson*, undersigned counsel rests on the Petitioner's motion and submits no additional arguments at this time." ECF No. 54.

II. LEGAL STANDARDS

When a petitioner in federal custody wishes to collaterally attack his sentence or conviction, the appropriate motion is a § 2255 motion. *United States v. Winestock*, 340 F.3d 200, 203 (4th Cir. 2003). Section 2255 of Title 28 of the United States Code governs post-conviction relief for federal prisoners. It provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

In a proceeding to vacate a judgment of conviction, the petitioner bears the burden of proving his or her claim by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958). Motions under § 2255 “will not be allowed to do service for an appeal.” *Sunal v. Large*, 332 U.S. 174, 178 (1947). For this reason, issues already fully litigated on direct appeal may not be raised again under the guise of a collateral attack. *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976).

When deciding a § 2255 motion, the Court must promptly grant a hearing “unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). Whether a hearing is mandatory for a § 2255 Motion and whether petitioner’s presence is required at the hearing is within the district court’s sound discretion and is reviewed for abuse of discretion. *Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970) (citing *Machibroda v. United States*, 368 U.S. 487 (1962)).

III. DISCUSSION

A. 28 U.S.C. § 2255(f)

A § 2255 motion is subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). The beginning date for that one-year limitations period is not universal, but is dependent upon the motion’s allegations. Petitioner’s § 2255 Motion is not timely under § 2255(f)(1) because he filed more than one year after his judgment of conviction became final. The motion is not timely under § 2255(f)(2) because Petitioner alleges no unlawful governmental action that prevented him from filing the § 2255 Motion. The motion is not timely under § 2255(f)(4) because Petitioner provides no evidence of newly discovered facts that would affect his sentence.

Because Petitioner raises his 2255 motion pursuant to *Johnson*, he essentially argues that his motion is timely under subsection (f)(3), which states that the one-year time limit begins on

“the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(3).

“Thus, to obtain the benefit of the limitations period stated in § 2255(f)(3), [a petitioner] must show: (1) that the Supreme Court recognized a new right; (2) that the right ‘has been ... made retroactively applicable to cases on collateral review’; and (3) that he filed his motion within one year of the date on which the Supreme Court recognized the right.” *United States v. Mathur*, 685 F.3d 396, 398 (4th Cir. 2012) (quoting § 2255(f)(3)). The threshold issue for the Court, then, is whether this motion is timely under § 2255(f)(3). The core question of this timeliness inquiry is whether Petitioner is asserting a right that the Supreme Court has recognized.

It is appropriate to equate the term “right,” as used in § 2255(f)(3), with the term “rule,” as used in the Supreme Court and Courts of Appeals cases cited in this opinion. *See United States v. Cuong Gia Le*, No. 1:03-cr-48-TSE, ECF No. 691 at 13-16 (E.D. Va. Sept. 8, 2016) (Ellis, J.). Rather than alternate between the two terms, this opinion will use the term “rule” throughout, with the intent that it be read as synonymous with the “right” discussed in § 2255(f)(3).

“[A] case announces a new rule when it breaks new ground To put it differently, a case announces a new rule if the result was not *dictated* by [existing precedent].” *Teague v. Lane*, 489 U.S. 288, 301 (1989) (emphasis in original). A certain result is considered to be “dictated” by existing precedent if that result is “apparent to all reasonable jurists.” *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). Similarly, the Fourth Circuit’s “new rule” test says a rule is new unless it would be “objectively unreasonable” under existing law “for a judge to reach a

contrary result.” *O’Dell v. Netherland*, 95 F.3d 1214, 1223–24 (4th Cir. 1996). “A case does not ‘announce a new rule, [when] it [is] merely an application of the principle that governed’ a prior decision to a different set of facts.” *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Teague*, 489 U.S. at 307).

B. The *Johnson* Decision

The Supreme Court recognized a new rule in *Johnson v. United States*. In *Johnson*, the Court held that the residual clause of 18 U.S.C. 924(e)(2)(B)(ii), part of the Armed Career Criminal Act (ACCA), was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557-58. In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court made that rule retroactive to cases on collateral review. *Welch*, 136 S. Ct. at 1265. The question raised by the instant motion is whether § 924(c)(3)(B) is part of the rule recognized in *Johnson* and made retroactive in *Welch*.

Petitioner argues that the similarities in language between the ACCA residual clause and § 924(c)(3)(B) are such that the rule applicable to the former necessarily governs the latter. Before the Supreme Court delivered its opinion in *Johnson*, the U.S. Solicitor General made this same argument in a Supplemental Brief to the Court. Suppl. Br. Resp’t at 22, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120). The brief listed dozens of state and federal laws that employ language similar to the ACCA’s residual clause, including § 924(c)(3)(B). *Id.* at 1a. The purpose of this list was to encourage the Supreme Court to uphold the constitutionality of the ACCA residual clause, warning that a contrary decision would effectively render void the myriad other laws containing similar language, including § 924(c)(3)(B). *Id.* at 22-26. The Court’s opinion in *Johnson* flatly rejected this argument:

The Government and the dissent next point out that dozens of federal and state criminal laws use terms like “substantial risk,” “grave risk,” and “unreasonable risk,” suggesting that to hold the

residual clause unconstitutional is to place these provisions in constitutional doubt. . . . Not at all.

Johnson, 135 S. Ct. at 2561.

The Court confirmed this again in *Welch*, saying, “The Court’s analysis in *Johnson* thus cast [sic] no doubt on the many laws that ‘require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion.’ ” *Welch*, 136 S. Ct. at 1262 (quoting *Johnson*, 135 S. Ct. at 2561).

To meet the requirements of § 2255(f)(3), Petitioner’s claim must be governed by a rule that the Supreme Court has recognized. When the Court created a new rule governing the ACCA residual clause, it also took care to clarify that this new rule does not put similar laws, like § 924(c)(3)(B), “in constitutional doubt.” The *Johnson* and *Welch* opinions thwart Petitioner’s argument that the rule announced in *Johnson* necessarily invalidates § 924(c)(3)(B) as well.

IV. CONCLUSION


For the reasons set forth above, the Court finds that Petitioner is not entitled to relief. Accordingly, Petitioner’s Motion to Vacate is **DENIED** and Respondent’s Motion to Dismiss is **GRANTED**.

Additionally, Petitioner has not set forth a specific issue that demonstrates a substantial showing of a denial of a constitutional right. Therefore, pursuant to 28 U.S.C. § 2253(c)(2), a Certificate of Appealability is **DENIED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to Petitioner and to the United States Attorney.

IT IS SO ORDERED.

Norfolk, Virginia
November 15, 2016



Raymond A. Jackson
United States District Judge